91-681 (1)

Supreme Court, U.S.
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No. -

In The

Supreme Court of the United States

October Term, 1991

CHEMUNG CANAL TRUST COMPANY, as Trustee of the Fairway Spring Company, Inc. Restated Pension Plan,

Petitioner,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Under ERISA, may a former plan trustee which had full authority and responsibility for investment decisions, in a suit against it by its successor trustee, counterclaim against its successor for contribution and indemnity against damages assessed against the former trustee as a result of investment losses?

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OPINIONS BELOW

The opinion of the Court of Appeals (reproduced at Appendix 27) (hereinafter "A"), issued on July 25, 1991, is reported at 939 F.2d 12 (2d Cir. 1991). The opinion of the District Court, issued on December 27, 1990 (A-15), is reported at 753 F. Supp. 81 (W.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on July 25, 1991. (A-27) Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This petition involves various provisions of the Employee Retirement Income Security Act ("ERISA") (29 U.S.C. ch. 18), especially 29 U.S.C. § 1103(a), 29 U.S.C. § 1104(a), 29 U.S.C. § 1105, and 29 U.S.C. § 1132. The provisions involved are lengthy, and their pertinent text is set forth in the Appendix to the Petition of Fairway Spring Co., Inc. and incorporated by reference.

STATEMENT OF THE CASE

Introduction

This case presents to the Court an important question of federal law on which there are conflicting decisions of the Courts of Appeals which needs to be settled by this Court. The decision of Second Circuit Court of Appeals, now appealed from, creates, for the first time in any jurisdiction, a right on behalf of a former investment trustee under the Employee Retirement Income Security Act of 1974 ("ERISA") to sue its successor for contribution

and indemnity. Other federal courts, including the Ninth Circuit Court of Appeals, have reached a contrary conclusion.

FACTS

Co-petitioner Fairway Spring Co., Inc., a small specialty manufacturing business in upstate New York, established a pension plan to provide retirement income for its employees. Unfortunately, between 1982 and 1984, the trustee of the Plan, one Glen E. Dawson, invested its funds in a series of investments which turned out to be fraudulent or imprudent. As a result, the Plan incurred sizeable losses. There is no dispute that the investments were blatantly improper and violated ERISA "prudent man" standards. 29 U.S.C. § 1104(a)(1).

In February, 1985, before any losses were realized or suspected, Dawson was succeeded as trustee of the Plan by respondent Sovran Bank/Maryland (hereinafter "Sovran"). The full extent of the irregularities eventually became apparent to Fairway when Sovran wrote off the investments in its 1988 annual report. In August, 1989 Fairway fired Sovran as trustee and hired petitioner Chemung Canal Trust Company (hereinafter "Chemung") in its place.

Chemung and two plan beneficiaries commenced this action against Sovran in the United States District Court for the Western District of New York for neglecting its fiduciary duties under ERISA. The complaint alleged that Sovran failed to investigate the Plan's investments, failed to dispose of the improper investments, and failed to bring timely claims against the original trustee, Dawson, and the bond and insurance companies from whom claims against Dawson could have been recovered within the time limits provided in the bond and insurance policies. The complaint also alleged that Sovran itself had made additional im-

prudent investments and failed to diversify investments. On behalf of the Plan, Chemung sought damages of $1,507,313.34, plus interest, against Sovran.

Sovran then filed a third-party complaint charging Fairway Spring Co., Inc. itself, Fairway's officers and directors, its attorney, and unnamed persons alleged to be members of an investment committee (hereinafter collectively referred to as "Fairway") with responsibility for the Plan's losses. Sovran sought indemnity and contribution against Fairway for allegedly failing to discover and correct Dawson's breaches itself and for failing to disclose them to Sovran. The relief demanded included both the damages sustained by the Plan and damages to Sovran. Sovran also filed a counterclaim for indemnity and contribution against Chemung, which had aggressively instituted legal proceedings to recover the Plan's losses within five months after becoming Trustee.

Decisions of the District Court and Court of Appeals

Upon a Rule 12(b)(6) motion by Chemung, the District Court (Telesca, U.S.D.J.) dismissed the counterclaim against Chemung on the grounds that Sovran lacked standing to bring suit on behalf of the Plan and that ERISA provides no right of contribution or indemnity from co-fiduciaries. The District Court then issued an order under FRCP 54(b) authorizing entry of a final judgment as to the counterclaim so as to permit an immediate appeal.

The Second Circuit Court of Appeals affirmed in part and reversed in part. The court was unanimous in affirming the holding that Sovran lacked standing to sue for damages on behalf of the Plan. Although the majority agreed with Judge Telesca that the methodology of *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26 (1975) could not support an implied cause of action for contribution or

indemnity under ERISA, the majority decided that a right of contribution should nevertheless be recognized as a matter of "federal common law." (A-34).

Judge Altimari dissented from the majority holding, stating that in his view "if Congress had intended to include a right of action for contribution and indemnification it would have done so." (A-41).

Basis for Federal Jurisdiction of the District Court

The District Court had jurisdiction of the action in the first instance under section 502(e)(1) of ERISA (29 U.S.C. § 1132(e)(1) which gives the district courts exclusive jurisdiction of civil actions under ERISA.

WHY THE PETITION SHOULD BE GRANTED

A. *The decision of the court below conflicts with decisions in other circuits regarding a right to contribution or indemnity under ERISA.*

The fundamental issue presented by Sovran's counterclaim is whether an ERISA plan trustee may seek contribution or indemnity from a successor trustee. It is important to note the nature of the conduct of Chemung for which Sovran seeks contribution. Sovran first alleges that at the time Chemung was appointed trustee of the Plan, the Plan had certain outstanding claims arising from various investments held by the Plan. It then alleges that, upon its appointment as trustee, Chemung failed to investigate and pursue these claims held by the Plan and therefore contributed to the losses alleged in the complaint. Since these claims which Sovran alleges Chemung failed to investigate and pursue were allegedly outstanding when Chemung became trustee, they

are the claims for which Sovran is being sued. In other words, Sovran is suing Chemung for not pursuing the very claims for which Chemung is suing.

The holding of the Second Circuit Court of Appeals that a right of contribution may be asserted as a matter of "federal common law" conflicts with decisions of the Ninth and Seventh Circuit Courts of Appeals and with district court decisions in other circuits. The discussion of the authorities on this point set forth in the petition of Fairway Spring Co., Inc., et al. is incorporated by reference.

B. *The creation of a new right of contribution disrupts the legislative balance struck by Congress in crafting ERISA.*

Failing to appreciate that Congress had already enacted detailed legislation in the area of co-fiduciary liability, the majority below also failed to consider the extent to which the creation of a new right of contribution "might upset carefully considered legislative programs." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981).

The result portended by the Second Circuit will discourage trustees such as Chemung from accepting the responsibility for a trust in which the investments are in disarray. As successor trustee, Chemung has a duty to the Plan and its beneficiaries to pursue claims arising from imprudent investments made in the past. It exercises discretion at its peril and if it fails to act properly, it may be liable to the Plan and to beneficiaries. Congress spelled out when it might be responsible. 29 U.S.C. § 1105(a). Congress did not spell out that it might be liable to a former trustee, Sovran, because it failed to sue other fiduciaries or former fiduciaries. Most of the responsible parties, such as former trustee Dawson and his company Chesapeake Pension Consultants, Inc., the securities salesman George Schnabel, and the investment companies First American Mortgage Company

and Government Financial Services, Inc. were bankrupt. Fairway, by virtue of annual employer's contributions made to the Plan to restore required funding of benefits, was voluntarily compensating for the problem. Chemung, as trustee, should have and was given by Congress the authority and responsibility to pursue these claims for the best interests of the Plan. The Second Circuit improperly added to the Congressional plan the right of a defendant to sue the plaintiff on the grounds that others had not been sued.

This Court stated in *Russell* that it was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 147, 87 L. Ed. 2d 96, 106 (1985). The Second Circuit clearly did not share that reluctance, however, and its decision should be reviewed by this Court.

C. *The issue of the right of contribution among ERISA co-fiduciaries is a federal question which has not been but should be settled by this Court.*

There are thousands of ERISA plans throughout the United States. Under ERISA, the employer and, if the employer is a corporation, each director of the corporate employer, is included in the definition of fiduciary. Employers, both corporate and individual, have chosen in most cases to delegate responsibility for investment decisions to a professional trustee, usually either a trust company or insurance company. While those corporate owners and directors felt responsible to individual plan beneficiaries for exercising good judgment in selecting the corporate trustee, they felt secure from claims by the professional trustee that the corporate owners and directors should supervise and share responsibility for the professional trustee's investment decisions. Under the Second Circuit's decision, those corporate owners and directors have suddenly become exposed to suit by

the imprudent professional trustee. With a split between the Second Circuit and the decisions in other circuits referred to in the Fairway petition and incorporated by reference therein, thousands of business owners and directors are uncertain as to their duties and liability. Faced with the inability to delegate investment responsibility to professional trustees, many corporate directors may choose not to serve as directors and many corporate owners may choose not to continue retirement plans. A definitive answer is urgently needed by the business community.

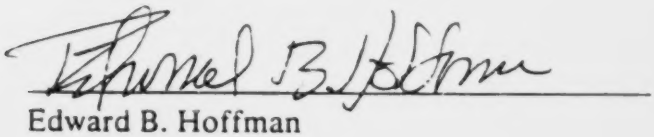
CONCLUSION

In the face of a comprehensive statute in which Congress has already addressed rights of co-fiduciaries, the courts are not warranted in creating a new right of contribution or indemnity in favor of one ERISA fiduciary against a co-fiduciary under the guise of "federal common law." The recognition of a right of contribution threatens, moreover, to upset the "carefully considered legislative program" represented by the ERISA statute.

The circuit courts are divided on this issue. It is an important federal question which needs to be settled. It is respectfully urged that the Court grant the petition and set the case for argument.

Dated: October 21, 1991.

Respectfully submitted,



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v.

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Respondent.

CHEMUNG CANAL TRUST COMPANY, as Trustee of the Fairway Spring Company, Inc. Restated Pension Plan,

Petitioner,

v.

SOVRAN BANK/MARYLAND,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

May the courts develop a federal common law of contribution among fiduciaries under the Employee Retirement Income Security Act of 1974 ("ERISA") in accordance with Congress's instruction, as acknowledged by the Court, to develop federal common law under ERISA based on trust law?

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v.

SOVRAN BANK/MARYLAND,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Recognizing the authority granted by Congress to the federal courts under ERISA to develop a federal common law of ERISA based on the common law of trusts, the court of appeals reversed the dismissal of Sovran Bank/Maryland's [1] ("Sovran") federal common law counter-

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[1] C&S/Sovran Corporation is Sovran's parent. Sovran has no non wholly-owned subsidiaries.

claim and third party claims for contribution and indemnity against other fiduciaries of the Fairway Spring Company, Inc. Restated Retirement Income Plan ("Plan"). Appendix ("A.") 27-41. Those other fiduciaries seek a writ of certiorari from this Court.

Fairway Spring Company, Inc. ("Fairway") established the Plan in 1981 to provide retirement benefits for its employees. A. 29. Under the terms of the Plan, Fairway has the authority to appoint a trustee of the Plan. *Id.* Acting through its officers, petitioners Theodore Peterson, Donald R. Peterson, and Dorothy Tarby, Fairway appointed Glen Dawson as the Plan's trustee. A. 29-30.

While trustee of the Plan, Dawson made imprudent investments for the Plan and engaged in transactions prohibited under ERISA's fiduciary standards. A. 30. For example, Dawson invested in various interest bearing notes that purportedly were secured by real property. Dawson failed to investigate the validity of the notes, the creditworthiness of the obligors, or the validity of the security interests supporting the notes. Further, he failed to obtain proper documentation of the Plan's investments in these notes and failed to perfect security interests in the collateral. He also generally failed to diversify the Plan's investments. Joint Appendix to Appellate Briefs ("J.A.") 10-12. Dawson's breaches of fiduciary duty allegedly caused the Plan ultimately to lose more than $1.6 million. J.A. 23.

Fairway and its officers, as the fiduciaries who appointed Dawson, also had the duty to monitor Dawson's performance. A. 30-31. Thus, they knew or should have known of Dawson's breaches. *Id.* However, without acknowledging or taking action to remedy Dawson's fiduciary breaches, Fairway removed Dawson as trustee of the Plan effective December 31, 1984. A. 30. After Dawson's removal as trustee, Lynn Keyser, counsel to Fairway, exercised authority over the Plan and its assets. *Id.* Then, effective February 1, 1985, Fairway appointed

Sovran trustee of the Plan, again without acknowledging any irregularities in Dawson's performance. *Id.*

Some of the imprudent investments that Dawson made for the Plan performed adequately for a time after Sovran's appointment as trustee. *Id.* Eventually, however, payments owed to the Plan under some of these investments ceased.[2] *Id.* In 1989, due to the losses caused by these investments, Fairway removed Sovran as trustee and appointed Chemung trustee of the Plan. *Id.*

As trustee of the Plan, Chemung filed an action against Sovran to recover the losses suffered by the Plan under Dawson's investments and two additional investments allegedly made by Sovran. *Id.* Chemung did not name Fairway or its officers as defendants, despite their failure to monitor Dawson, to correct his breaches, or to disclose his breaches to Sovran. J.A. 1-25. Instead, Chemung sought to collect only from Sovran the amounts lost by the Plan on Dawson's bad investments, notwithstanding the fact that Sovran, unlike Fairway and its officers, had neither the duty nor the opportunity as Dawson's successor to monitor or prevent his investments. *Id.* Under Chemung's theory, regardless of who was responsible for Dawson's fiduciary breaches, or the degree of culpability, Sovran and Sovran alone was required to bear all of the loss resulting from those breaches.

Sovran disagreed, filing a counterclaim against Chemung and a third party action against Fairway, three of

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[2] In 1986, the Department of Labor commenced an action against Dawson to recover losses incurred by 46 pension plans, including the Fairway Plan, caused by Dawson's breaches of fiduciary duty in connection with certain mortgage investments he made for the plans. *McLaughlin v. Dawson*, No. JFM 86-2536 (D. Md.). Thereafter, Dawson filed for bankruptcy. *In re Dawson*, No. 87-5-1372 (Bankr. D. Md.). The Plan received approximately $4,000 as its pro-rata share of the $70,000 the Department of Labor received in settlement of its action. Consent Order, *McLaughlin v. Dawson*, No. JFM 86-2536 (D. Md. Nov. 9, 1988). Under the Consent Order, Dawson was permanently enjoined from acting as a plan fiduciary. *Id.*

its officers, and Fairway's attorney for breach of their fiduciary duties to the Plan under ERISA, alleging, *inter alia*, that they had failed to monitor the activities of Sovran's predecessor, failed to correct his fiduciary breaches, and failed to disclose them to Sovran. A. 30-31.

The district court dismissed Sovran's counterclaim and third party complaint, holding that ERISA does not explicitly provide for contribution among fiduciaries and declining to recognize such a remedy under federal common law. A. 31. The United States Court of Appeals for the Second Circuit reversed. A. 27-41. Consistent with three decisions of this Court and decisions in eight other circuits, the court of appeals recognized that Congress explicitly instructed courts to develop federal common law under ERISA based on trust law and that contribution has been a part of trust law for more than a century.

SUMMARY OF ARGUMENT

The decision of the court of appeals recognizing a right of contribution among fiduciaries is consistent with this Court's recognition of the authority granted to federal courts to develop federal common law under ERISA based on trust law. No conflict arises as a result of the Second Circuit's decision because no court of appeals that has refused to recognize contribution applied the "federal common law" analysis used by the Second Circuit. Specifically, the Ninth Circuit, which has rejected contribution among ERISA fiduciaries, applied the *Cort v. Ash* test and determined there is no implied right of contribution under ERISA. The Second Circuit is in complete accord with that finding.

Finally, recognizing a right of contribution is fully in keeping with the purpose and goals of ERISA and will not undercut the legislative scheme embodied in ERISA. Accordingly, recognition of contribution among fiduciaries under federal common law raises no issue that requires the Court's intervention.

REASONS FOR DENYING THE WRIT

I. A FEDERAL COMMON LAW RULE OF CONTRIBUTION AMONG ERISA FIDUCIARIES IS CONSISTENT WITH THE PURPOSE OF THE STATUTE AND THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS RECOGNIZING THAT THE COURTS ARE TO DEVELOP A "FEDERAL COMMON LAW OF RIGHTS AND OBLIGATIONS UNDER ERISA-REGULATED PLANS."

The court of appeals based its decision to recognize a right of contribution among ERISA fiduciaries on well-settled principles of law. Nothing in the decision, and nothing in its result, warrants review by this Court.

The court of appeals' analysis of the issue is straightforward. Consistent with three decisions of this Court, its own precedent, and decisions of eight other circuits, the court of appeals began by recognizing that the courts are obliged to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Proceeding from this premise, the court of appeals, again consistent with extensive precedent confirming that ERISA is grounded in the law of private trusts, turned to traditional trust law for guidance in deciding whether to incorporate a right of contribution into the common law of ERISA. The court of appeals readily discerned that from the earliest days of the English chancery courts, and continuing today in the modern American law of private trusts, the equity courts have uniformly recognized that trust fiduciaries are entitled to seek contribution from their cofiduciaries who have jointly caused the trust to suffer a loss. The court of appeals therefore concluded that it is entirely consistent with the statutory design to permit an ERISA fiduciary accused of a breach of duty to seek contribution from other plan fiduciaries whose conduct contributed to the plan's loss.

The petitioners contend that the court of appeals misunderstood the Court's repeated observations in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *Pilot Life Ins. Co.*, and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) that "the courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone Tire and Rubber Company*, 489 U.S. at 110 (quoting *Pilot Life Ins. Co.*, 481 U.S. at 56).[3] According to the petitioners, this statement means nothing more than that the federal courts are to apply the traditional common law tools of analysis to determine the meaning of the statute. It does not mean, the petitioners assert, that the federal courts are authorized in ERISA cases to act as traditional common law courts and fashion rules of law needed to resolve issues that the legislature has not addressed. Therefore, they conclude, the court of appeals exceeded its authority as a court of limited jurisdiction by adopting a rule not specifically delineated in ERISA. Petition ("Pet.") at 10-12, 24-25.

This argument ignores the premises of this Court's statements in *Firestone Tire and Rubber*, *Pilot Life*, and *Franchise Tax Board*.

It is, of course, elementary that the federal courts are courts of limited jurisdiction. As such, they ordinarily may do no more than apply federal law as enacted by Congress. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981); *see United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). In some instances, however, this Court has concluded that in en-

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[3] In *Franchise Tax Board*, the Court observed that "* * * ERISA's legislative history indicates that, in light of the Act's virtually unique preemption provision, see § 514, 29 USC § 1144, 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.' 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)." 463 U.S. at 24 n.26.

acting a particular statute, Congress intended to confer on the federal courts the power to develop a body of federal common law consistent with federal policy expressed in the statutory scheme. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978); *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1963). For example, this Court long ago decided that in granting to the federal courts exclusive power to adjudicate disputes over breaches of collective bargaining agreements under section 301(a) of the Labor-Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 185(a), Congress intended that "* * * the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. at 96 n.35 ("In *Textile Workers v. Lincoln Mills*, * * * we concluded that § 301(a) supplied a basis for federal jurisdiction over certain cases and an authorization for judicial development of substantive federal law to govern those cases.").

It is against this background that this Court examined the role of the federal courts in adjudicating disputes arising under ERISA. In *Pilot Life*, a case involving the availability of state common law causes of action against an ERISA plan, the Court reviewed ERISA's legislative history and noted that the Conference Report on ERISA made clear in discussing the civil enforcement provisions of the statute that, "'[a]ll such actions . . . are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.'" *Pilot Life*, 481 U.S. at 55 (quoting H.R. Conf. Rep. No. 1280, p. 327 93d Cong., 2d Sess. (1974) (Court's emphasis deleted). Similarly, the Court noted that the principal majority and minority sponsors of the legislation made floor statements confirming that actions arising under ERISA "'will be

regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act' " and that " '[i]t is intended that a body of Federal substantive law will be developed by the courts to deal with rights and obligations under private welfare and pension plans.' " *Id.* at 56 (citations omitted). From this, the Court concluded that there was a clear expectation "* * * that a federal common law of rights and obligations under ERISA-regulated plans would develop * * *" *Id.*

As this Court's decisions recognize, the role of the federal courts in ERISA cases is not limited to statutory interpretation, as the petitioners contend. To the contrary, Congress plainly intended the courts to function in this arena in the same way that they have done for over 30 years under the LMRA—to develop federal common law "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Textile Workers Union*, 353 U.S. at 457.[4]

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[4] Consistent with this directive, the courts of appeals have repeatedly recognized their obligation to formulate rules of decision under federal common law to resolve issues for which ERISA contains no explicit statutory rule. *E.g., Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989) ("Congress specifically contemplated that federal courts, in the interests of justice, would engage in interstitial lawmaking in ERISA cases in much the same way as the courts fashioned a federal common law of labor relations under section 301 of the LMRA."); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (recognizing a claim under general trust law principles for knowing participation in a fiduciary breach); *Plucinski v. I.A.M. Nat. Pension Fund*, 875 F.2d 1052, 1056 (3d Cir. 1989) ("Since Congress both authorized and expects that the courts will create a common law under ERISA, we need not look for a specific congressional intent to create the remedy at issue."); *Provident Life and Accident Insurance Co. v. Waller*, 906 F.2d 985, 993-94 (4th Cir.) (appropriate "to weave into the statutory fabric of ERISA the federal common law remedy of unjust enrichment"), *cert. denied*, 111 S. Ct. 512 (1990); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 972-73 (5th Cir. 1981) ("The legis-

The court of appeals was on equally solid ground when it turned to the law of private trusts for guidance in determining whether federal common law should incorporate a right of contribution among ERISA fiduciaries. This Court has made it abundantly clear that trust law is the appropriate guidepost for resolving issues on which ERISA is silent.

> ERISA abounds with the language and terminology of trust law. * * * ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, * * * "codif[y] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." * * * Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." * * * In determining the appropriate standard of review for actions under § 1132(a)(1)(B), *we are guided by principles of trust law.*

Firestone Tire & Rubber, 489 U.S. at 110 (citations omitted; emphasis added). *See Central States, Southeast*

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lative history of ERISA indicates that this section was intended to create a federal common law concerning pension rights, which would augment the rights created by ERISA's substantive provisions."); *Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 794 F.2d 221, 236 (6th Cir.) (employer's claim for return of mistaken contributions arises under and is governed by federal common law), *cert. denied*, 479 U.S. 1007 (1986); *Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir.) (*en banc*) ("When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits."), *cert. denied*, 111 S. Ct. 67 (1990); *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978) (relying on common law of trusts to uphold remedy of recision); *Nachwalter v. Christie*, 805 F.2d 956, 959-60 (11th Cir. 1986) (acknowledging power to fashion federal common law but refusing to adopt a rule estopping the enforcement of the plan's terms "because ERISA expressly addresses the issue"); *but see Nieto v. Ecker*, 845 F.2d 868, 872 (9th Cir. 1988) (rejecting argument "that the common law of trusts supplies a federal cause of action where the statute itself provides none.")

& Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985) ("* * * rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-334 (1981) (Congress intended that union welfare funds regulated by the Taft-Hartley Act be operated under traditional trust law principles, and this desire became explicit in ERISA).

Mindful of this, the court of appeals examined the treatment of contribution claims under private trust law and found overwhelming authority for the proposition that a trust fiduciary is entitled to seek contribution from a cofiduciary who shares responsibility for a loss sustained by the trust. As the court of appeals put it,

> We must next determine whether traditional trust law provides for a right of contribution among defaulting fiduciaries. Indisputably, it does. Chemung and Fairway do not seriously contend to the contrary, nor could they, because the right of contribution among co-trustees has been for over a century, and remains, an integral and universally-recognized part of trust doctrine. *See* Restatement (Second) of Trusts § 258 (1959); Bogert, *The Law of Trusts and Trustees*, § 701 (2d ed. rev. 1982) (citing *Perry v. Knott*, 4 Beav. 179 (1842); *Sherman v. Parish*, 53 N.Y. 483 (1873)).

A. 35.

The petitioners are now in no better position to argue that a right of contribution is antithetical to the trust law principles embodied in ERISA than they were in the court of appeals. The principle of contribution is central to the law of equity, and has been so since the development of the concept of equity by the Roman courts. J. Pomeroy and S. Symons, II *Equity Jurisprudence* §§ 405

and 406 (5th ed. 1941); Halsbury, 38 *The Laws of England* ¶ 1829 (3d ed. 1962). The petitioners have offered no persuasive reason for this Court to depart from this bedrock principle of equity; nor have they advanced any reason for believing that Congress would have preferred a different result under the law of employee benefit trusts.

II. THERE IS NO SUBSTANTIAL CONFLICT AMONG THE CIRCUITS. THE COURTS OF APPEALS WHICH HAVE REJECTED CONTRIBUTION CLAIMS HAVE DONE SO ONLY BECAUSE THERE IS NO IMPLIED RIGHT OF CONTRIBUTION UNDER ERISA.

The petitioners contend that the decision below conflicts with decisions in other circuits, principally *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989) and *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989). The petitioners are mistaken. These cases decided nothing more than that a right of contribution among ERISA fiduciaries is not a statutorily "implied right of action" under the principles enunciated in *Cort v. Ash*, 422 U.S. 66 (1975). As the decision below recognized, the Ninth Circuit correctly resolved the issue presented to it. A. 34. But to say that ERISA contains no implied right of action for contribution under the *Cort v. Ash* test plainly does not answer the question of whether there should be a federal common law right of contribution under ERISA.

As this Court has made clear in at least two decisions, the question of whether there is a statutorily implied right of action for contribution is entirely distinct from the question of whether the federal courts, properly exercising federal common law powers in appropriate circumstances, should adopt a right of contribution. *Northwest Airlines*, 451 U.S. at 86; *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 638 (1981). Here, the court of appeals agreed that there is no statutorily implied right of action for contribution, but recognized that it should formulate a right of contribution as a matter of federal

common law. This decision is entirely consistent with this Court's precedent, and it is not in conflict with the *Call* decision.

At issue here are two seemingly related but quite different doctrines. In *Cort v. Ash*, this Court distilled from its earlier decisions a four factor test for determining when, as a matter of statutory construction, it is appropriate for the courts to find a private cause of action implied in a particular statutory scheme. The Court held that it is appropriate to imply a cause of action only if it can be determined that the party seeking the remedy is a member of the class for whose benefit the legislation was enacted, that Congress intended to create such a cause of action, that the remedy is consistent with the legislative scheme, and that the remedy is not one traditionally relegated to state law. 422 U.S. at 78. More recently, this Court has confirmed that the factors identified in *Cort v. Ash* apply equally to questions of statutory interpretation under ERISA. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) ("Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in § 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages * * *.")[5]

The federal common law doctrine, in contrast, is available in only two limited situations: where the courts in

[5] Throughout their briefs, the petitioners suggest that the decision here is inherently inconsistent with this Court's decision in *Russell*. However, it is evident that *Russell* was concerned only with the question of whether a cause of action should be implied under section 409(a) of ERISA. 473 U.S. at 138 n.5; *id.* at 149 ("This case presents a single, narrow question: whether the § 409 'appropriate relief' referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extra-contractual damages for breach of fiduciary duty.") (Brennan, J., concurring). Thus, unlike *Northwest Airlines* and *Texas Industries*, the Court was never presented with, and certainly did not reach, the question of federal common law.

the absence of legislation must "* * * fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States * * *," *Northwest Airlines*, 451 U.S. at 95; or under a few statutes where "* * * Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law." *Texas Industries*, 451 U.S. at 642. As the Court's analyses in *Northwest Airlines* and *Texas Industries* make plain, the implied right of action and federal common law doctrines are "two quite different theories," *Northwest Airlines*, 451 U.S. at 86, and the outcome under one theory is not dispositive of the outcome under the other theory.

Despite this, the petitioners contend that the decision of the court of appeals conflicts with decisions in other circuits rejecting a right of contribution among ERISA fiduciaries. An examination of the cases that the petitioners rely on reveals that there is no substantial intercircuit conflict.

The petitioners rely principally on two decisions of the Ninth Circuit, *Kim v. Fujikawa*, 871 F.2d 1427, and *Call v. Sumitomo Bank of California*, 881 F.2d 626. Both cases presented a single narow issue: whether section 409 of ERISA, 29 U.S.C. § 1109, can be interpreted to provide, by implication, a right of contribution among ERISA fiduciaries. In *Kim*, the court summarily rejected the claim, stating that

> * * * As the Supreme Court noted in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 141-42 (1984), section 409 of ERISA * * * only establishes remedies for the benefit of the *plan*. Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a *breaching fiduciary*. *See Call v. Sumitomo Bank*, 689 F. Supp. 1014, 1017-20 (N.D. Cal. 1988).
>
> * * * *

> * * * we cannot agree with Fujikawa's contention that Congress implicitly intended to allow a cause of action for contribution under ERISA * * *.

Kim, 871 F.2d at 1432 (emphasis in original). Thus, as the petitioners appear to concede, Pet. at 6, *Kim* on its own plainly creates no conflict with the decision here. Indeed, the court of appeals has explicitly agreed that a right of contribution cannot be implied as a matter of statutory interpretation under the test set out in *Cort v. Ash*. A. 34.

The *Call* case likewise creates no conflict. Like *Kim*, the only issue presented on appeal in *Call* was whether there is a statutorily implied right of contribution under section 409(a) of ERISA.

> In their second cause of action, asserted by appellants in their capacity as fiduciaries, appellants sought contribution from all of the appellees in "an amount to be determined at the time of trial." *Appellants based this claim on ERISA § 409(a)*, 29 U.S.C. § 1109(a).

Call, 881 F.2d at 629 (emphasis added). The court of appeals rejected this argument explicitly on the ground that its earlier decision in *Kim* was a binding determination of the issue.

> * * * we are foreclosed from considering these arguments because they were rejected in our recent decision in *Kim* * * * In that case, we held that ERISA § 409, 29 U.S.C. § 1109, the provision upon which appellants in the instant case rely, "only establishes remedies for the benefit of the *plan*" and therefore "cannot be read as providing for an equitable remedy of contribution in favor of a *breaching* fiduciary."
>
> * * * *
>
> The *Kim* opinion is unambiguous and undistinguishable. Because *Kim* governs this case, we affirm the district court's dismissal of appellants' contribution claim.

Call, 881 F.2d at 630-31 (emphasis in original; citations and footnote omitted).

It is readily apparent that *Call* does not conflict with the decision here. The *Call* court held only that as a matter of statutory interpretation, section 409(a) of ERISA cannot be read to imply a cause of action for contribution, a holding with which the court of appeals below agreed. A. 34. The appellants in *Call* did not argue, and the court of appeals did not address the separate question of whether the courts should adopt a right of contribution as a matter of federal common law under ERISA. *Call*, 881 F.2d at 629; *see Call v. Sumitomo Bank of California*, 689 F. Supp. 1014, 1022 (N.D. Cal. 1988) ("* * * under *Northwest Airlines*, this Court may not imply a right of contribution into ERISA.").

Two other decisions cited by the petitioners require only brief discussion. In *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991), the court of appeals for the Seventh Circuit declined to fashion as a matter of federal common law a cause of action against a non-fiduciary for assisting in a violation of ERISA's reporting and disclosure requirements, concluding that such a claim would be inconsistent with explicit statutory policies. As such, the decision does not conflict in any way with the decision below or with settled principles governing the limits of the courts' authority to develop federal common law under a particular statutory scheme. *See Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 323 (1990) (in formulating maritime rules, the court "must * * * keep strictly within the limits imposed by Congress"). *Cf. Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir.) (*en banc*) ("When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits."), *cert. denied*, 111 S. Ct. 67 (1990).

In contrast, one district court in the Fourth Circuit has explicitly decided that it would not adopt a federal

common law of contribution among ERISA fiduciaries, reasoning that because Congress explicitly incorporated various principles of traditional trust law into the statute, it did not intend the courts to incorporate other trust principles as a matter of federal common law. *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 695-98 (D. Md. 1990). However, one month before *NARDA*, in a decision not cited by the district court, the Fourth Circuit adopted a federal common law rule of unjust enrichment, reasoning that such a rule furthered the policies expressed in the statute. *Provident Life & Acc. Ins. Co. v. Waller*, 906 F.2d 985, 992-93 (4th Cir.), *cert. denied*, 111 S. Ct. 512 (1990). This lone trial court decision, which evidently does not reflect the law in the Fourth Circuit, does not present a substantial conflict that merits resolution by this Court.

III. RECOGNIZING A RIGHT OF CONTRIBUTION AMONG ERISA FIDUCIARIES IS CONSISTENT WITH THE STATUTE'S POLICY GOALS AND WILL SERVE TO FOSTER THE GROWTH AND DEVELOPMENT OF EMPLOYEE BENEFIT PLANS.

Contrary to petitioners' assertions, recognizing contribution among fiduciaries as a remedy under ERISA common law is entirely consistent with the statute's purpose. Congress enacted ERISA to "protect the interests of participants in employee benefit plans * * *," ERISA § 2(b), 29 U.S.C. § 1001(b), articulating minimum standards to "assur[e] the equitable character of such plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001 (a). Thus, ERISA establishes "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and * * * provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). In specifying who is a fiduciary subject to these standards, Congress reached beyond mere titles, defining "fiduciary" as any individual

or institution exercising discretion or control over the managemnet of a plan or its assets. ERISA § 3(21), 29 U.S.C. § 1002(21). Recognizing contribution among this broad class of fiduciaries under ERISA furthers the goal of protecting the interests of participants and beneficiaries.

The availability of contribution among fiduciaries, for example, increases the likelihood that parties are brought into the action with a sufficient pool of resources to provide a full recovery to participants and beneficiaries. This is particularly important where a claim is asserted against one fiduciary and the fiduciary is unable to satisfy a judgment, in whole or in part. The ability to assert a contribution claim could also have the effect of extending the limitations period by permitting one fiduciary to seek contribution against another fiduciary even after a participant's claim is barred. Thus, contribution would generally make it easier for participants and beneficiaries to recover for fiduciary breaches.

The potential for liability to other fiduciaries serves as a stronger deterrent to fiduciary breach than the more limited risk of liability only to the plan. Without contribution, a breaching fiduciary is at risk only until another fiduciary reimburses the plan for a breach. With the possibility of an action for contribution, however, a fiduciary's potential liability is not extinguished by the plan's recovery from another fiduciary. This increased risk of liability increases a fiduciary's incentive to comply with ERISA's fiduciary standards.

Petitioners' own example illustrates the salutary effect the potential for contribution could have on a plan fiduciary's behavior. Petitioners explain that small employers may lack the expertise to comply with ERISA's technical requirements. Pet. at 13. Putting themselves in that class of small employers, petitioners apparently sought, by hiring Dawson and then Sovran, to relieve themselves of the duty to comply with ERISA's technical require-

ments. Pet. at 13. The specter of contribution, according to petitioners, would have a chilling effect on small employers, discouraging them from establishing ERISA plans. Pet. at 14. However, even hiring professional plan managers does not relieve an employer like Fairway of ERISA's very basic, non-technical duty to monitor fiduciaries hired to perform specific functions. If the threat of liability arising from potential contribution claims would have caused Fairway to take a harder look at the investments made by Dawson or to share with Sovran any doubts about Dawson's performance, such an effect promotes the purposes of ERISA.

The greater expense and effort for ERISA plaintiffs that petitioners foresee as a result of contribution among fiduciaries is similarly not a persuasive reason to omit this remedy. Pet. at 15. Petitioners' argument fails to acknowledge the multitudes who are already subject to suit under ERISA's broad, functional definition of "fiduciary." ERISA 3(21), 29 U.S.C. § 1002(21). Because Congress defined "fiduciary" for purposes of ERISA very broadly, most ERISA plaintiffs already name more than one party in their fiduciary breach actions. The incremental expense and effort that could result from cross-claims and third party claims among fiduciaries would hardly deter a plaintiff.

Permitting claims for contribution will also help to ensure an adequate pool of qualified institutions and individuals willing to serve as fiduciaries, and equally important, willing to serve at a reasonable cost to the plan. Fiduciaries commit breaches for reasons ranging from negligence or ignorance to affirmative criminal intent. Regardless of the reason for a breach, ERISA makes all breaching fiduciaries strictly liable to the plan for losses stemming from the breach. If, however, fiduciaries are prohibited from allocating among themselves the cost of the breach in accordance with their culpability, some individuals and institutions will be reluctant to undertake the role of fiduciary.

At bottom, petitioners' policy arguments against contribution fail to recognize three fundamental propositions. First, Congress made it plain that it intended to confer on the courts the power to establish a federal common law of employee benefit plans. Congress made it equally plain that the common law of ERISA should find its source in traditional trust law. Finally, from the earliest days, traditional trust law incorporated concepts of contribution and indemnity among trust fiduciaries. It follows that there is no justification whatsoever for denying fiduciaries of employee benefit plans the right to seek contribution and indemnity from their co-fiduciaries. To rule otherwise serves no purpose except to insulate some fiduciaries from the consequences of their misconduct.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Nos. 91-680 and 91-681

In the Supreme Court of the United States

OCTOBER TERM, 1991

FAIRWAY SPRING CO., INC., ET AL., PETITIONERS

v.

SOVRAN BANK/MARYLAND

CHEMUNG CANAL TRUST COMPANY, ETC., PETITIONER

v.

SOVRAN BANK/MARYLAND

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal courts, in developing a federal common law under the Employee Retirement Income Security Act (ERISA), may recognize claims for contribution or indemnity among fiduciaries.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-680

FAIRWAY SPRING CO., INC., ET AL., PETITIONERS

v.

SOVRAN BANK/MARYLAND

No. 91-681

CHEMUNG CANAL TRUST COMPANY, ETC., PETITIONER

v.

SOVRAN BANK/MARYLAND

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1981, petitioner Fairway Spring Company, Inc., established an employee retirement plan covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Acting through its officers,[1] Fairway appointed Glen Dawson as plan trustee.

[1] Theodore Paterson, Donald R. Peterson, and Dorothy Tarby, who are officers and directors of Fairway, and Lynn Keyser, the

Pet. App. A29-A30. Between 1982 and December 1, 1984, when he was removed, Dawson made various imprudent investments and engaged in transactions prohibited under ERISA's fiduciary standards. In the wake of Dawson's departure, his investments initially continued to yield income, but payments from certain of his investments eventually ceased, resulting in losses to the plan. *Id.* at A30; 91-680 Pet. 2-3.

After Dawson's removal, petitioner Lynn Keyser, the plan's attorney, exercised fiduciary authority over the plan for two months. On February 1, 1985, respondent Sovran Bank/Maryland was appointed trustee. Pet. App. A30. In 1989, Fairway removed Sovran and appointed Chemung Canal Trust Company, petitioner in No. 91-681, as plan trustee. *Id.* at A30.

2. In an effort to recover plan losses, Chemung brought this action under Section 502 of ERISA (29 U.S.C. 1132) against respondent Sovran Bank, in its capacity as former trustee. The complaint alleged that Sovran had breached its fiduciary duty to the plan by failing to discover and rectify Dawson's imprudent investments; by failing to bring timely actions against Dawson and the fidelity bond and insurance companies that had issued policies covering the losses [2]; and by making two unsound investments during its tenure as trustee. Plaintiffs sought over $1.5 million in damages plus interest from Sovran. Pet. App. A29; 91-680 Pet. 3.[3]

Sovran filed a counterclaim against Chemung, asserting that Chemung contributed to the plan's losses by failing

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Fairway pension plan's attorney, are petitioners in No. 91-680. Chemung Canal Trust Co., petitioner in No. 91-681, is presently trustee of the plan.

[2] In 1986, the Department of Labor sued Dawson to recover losses to 46 pension plans, including Fairway's. Br. in Opp. 3 n.2. Dawson filed for bankruptcy and the Fairway plan recovered $4,000 as its pro-rata share under the consent order. *Ibid.*

[3] Two plan beneficiaries were also plaintiffs in Chemung's suit. See Pet. App. A16. They did not participate in the court of appeals and are not parties in this Court.

to evaluate and pursue the pertinent claims. Pet. App. A16. Sovran sought relief on behalf of the plan, as well as contribution or indemnity for its own potential liability. *Id.* at A16, A31. Sovran also filed a third-party complaint against Fairway, its officers, and its counsel, claiming that they had breached their fiduciary duties under ERISA because they had not monitored and corrected Dawson's breaches or disclosed them to Sovran. *Id.* at A16, A30. Accordingly, Sovran requested contribution or indemnity from the Fairway third-party defendants. *Id.* at A16, A31.

3. The district court dismissed Sovran's counterclaim and its third-party complaint. Pet. App. A15-A23. First, the court held that Sovran—as a former fiduciary—did not have standing to bring a counterclaim on behalf of the plan. *Id.* at A17-A18. Second, the court concluded that ERISA did not allow claims for contribution or indemnity among fiduciaries. The court concluded that a right of contribution was unavailable because it was not implied in the statute and did not arise from federal common law. *Id.* at A18-A23. The court determined that the indicia of an implied cause of action were absent from the statutory scheme. Moreover, while acknowledging that ERISA authorizes courts to develop a substantive federal common law of rights and obligations, the court found that the integrated and comprehensive nature of the statute's remedial scheme counseled against adding further remedies to its enforcement provisions. *Id.* at A21-A22.

4. The court of appeals reversed and remanded with respect to Sovran's claims for contribution and indemnity.[4] Pet. App. A33-A40. The court concluded that the analytical framework for deriving implied rights of action was inapposite because the question before it involved the allocation of responsibility among defendants rather than the plaintiff's right to relief. *Id.* at A34. Instead,

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[4] The court of appeals affirmed the district court's holding that a former fiduciary has no standing to sue on behalf of the plan under Section 502(a) of ERISA, 29 U.S.C. 1132(a). Pet. App. A31-A33.

the court determined that Congress had directed the courts to develop a federal common law using traditional principles of trust law, and that a right of contribution among co-trustees was "an integral and universally-recognized part of trust doctrine." *Id.* at A35. The court further determined that the common law rule was consistent with ERISA: the rule would have "no financial impact" on the recovery of plan beneficiaries, who would be able to recover fully from any breaching fiduciary under a theory of joint and several liability (*id.* at A36); and any increase in the complexity of ERISA fiduciary litigation would be justified by the need to protect a fiduciary from bearing the full weight of a loss for which it was only partially responsible. *Ibid.* Thus, the court found that fiduciaries are entitled to assert the traditional trust law right of contribution under the common law of ERISA. *Ibid.*[5]

DISCUSSION

In our view, the court of appeals correctly determined that ERISA authorizes federal courts to apply the equitable doctrines of contribution and indemnity in apportioning liability among plan fiduciaries. This Court's precedents establish that ERISA requires courts to develop a federal common law governing fiduciary rights and obligations using traditional trust principles. The right of contribution among fiduciaries is a well established feature of the common law of trusts, and nothing in ERISA compels a departure from that rule.

Although the issue is important, we do not believe that further review is warranted at this time. Nine of the circuits have had no occasion to address this issue in the 18 years since ERISA was adopted. Moreover, the Ninth

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[5] Judge Altimari dissented. Pet. App. A40-A41. Although he believed the majority's holding made "good sense," *id.* at A40, Judge Altimari reasoned that Congress was aware that the issue of contribution or indemnification would arise under ERISA, and that Congress's omission of express contribution remedies for fiduciaries demonstrated that such rights had been rejected. *Id.* at A41.

Circuit—the only circuit to reject a right of contribution —has never directly addressed the merits of arguments that the Second Circuit found dispositive of the issue. We do not believe review by this Court is needed unless and until it becomes apparent that the courts of appeals cannot reach a consensus on the issue.

1. ERISA § 404 provides, in relevant part, that a fiduciary of an ERISA-regulated plan must "discharge his duties with respect to a plan * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Under ERISA § 409, moreover, a fiduciary who breaches the duties imposed by subchapter I, 29 U.S.C. 1001-1168, "shall be personally liable to make good to [an ERISA] plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. 1109(a). Section 409(a) also subjects a breaching fiduciary "to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. 1109(a).

ERISA § 502(a), 29 U.S.C. 1132(a), provides a mechanism for certain parties to seek redress for any breach of the fiduciary duties imposed by ERISA. Specifically, Section 502(a)(2) authorizes a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [ERISA § 409]." 29 U.S.C. 1132(a)(2). More generally, a breach of fiduciary duty is cognizable under Section 502(a)(3), which authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter [protection of employee benefit rights] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the

terms of the plan." 29 U.S.C. 1132(a)(3). Finally, under Section 502(a)(5), the Secretary of Labor enjoys similar authority to bring a civil action to obtain "appropriate equitable relief" to enforce ERISA's employee benefit protections and to redress violations of the statute. 29 U.S.C. 1132(a)(5). Section 502(e), 29 U.S.C. 1132(e), vests federal courts with jurisdiction to entertain any "civil action" brought by these parties under ERISA.

Although the statute includes detailed provisions concerning the rights of these parties to sue fiduciaries to recover losses to beneficiaries and the plan, the statute does not address rights of other parties to sue fiduciaries or make any express provision for assertion of claims among fiduciaries responsible for plan losses.[6] This Court has made clear, however, that a right of contribution can properly be recognized in the absence of express statutory authority if Congress either intended to create that right by implication, or if it authorized the courts to derive such a right as a rule of federal common law. See *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90 (1981); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). We share the court of appeals' view that Congress did authorize federal courts to determine whether a right of contribution should be recognized under the common law of ERISA, and that the equitable doctrine of contribution should properly form a part of that common law. Pet. App. A34-A40.

2. a. There can be no question that adjudication of a breach of fiduciary duty claim under ERISA requires resort to a federal common law of trusts. As this Court has

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[6] At common law, breaching co-trustees were generally liable for contribution from each other, but if one trustee was substantially more at fault than the other, received a benefit from the breach, or acted in bad faith, then the other trustee could obtain indemnity. See Restatement (Second) of Trusts § 258 (1959). For purposes of simplicity, we use the term "contribution" to refer to contribution or indemnity.

explained, "ERISA abounds with the language and terminology of trust law," *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989), and ERISA's "fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, 'codif[y] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" 489 U.S. at 110 (quoting H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973)). Accordingly, this Court has recognized that ERISA authorizes courts "to develop a 'federal common law of rights and obligations under ERISA-regulated plans,'" 489 U.S. at 110 (quoting *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987)), and that traditional principles of trust law are to be consulted in deriving federal common law under ERISA, see, *e.g.*, 489 U.S. at 111-115; *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

This Court has already determined that ERISA's authorization to develop federal common law rules is not limited to the substantive rights and obligations of ERISA plan fiduciaries, but also extends to the remedial provisions of ERISA. In *Firestone*, 489 U.S. at 108-115, the Court considered the appropriate standard of judicial review governing challenges to a plan's denial of benefits brought in actions under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B). Even though ERISA contains "a panoply of remedial devices" and represents a "comprehensive and reticulated statute," the Court concluded that Congress had not addressed all issues arising under that remedial scheme, but had instead delegated common law authority to the courts to answer unresolved questions. 489 U.S. at 108-111 (citation omitted). Thus, instead of resorting to the usual principles of statutory interpretation that ordinarily govern such questions, the Court examined established principles of trust law, and created a federal common law rule defining the scope of the remedy. *Firestone*, 489 U.S. at 111-115.

Similarly, congressional silence on the issue of contribution requires resort to common law principles under

ERISA. No part of Section 502(a) explicitly addresses the manner in which liability is to be enforced when more than one fiduciary is responsible for a single breach. Nor is that issue mentioned in ERISA § 405(a), 29 U.S.C. 1105(a),[7] the provision prescribing the conditions under which one fiduciary may be liable for another's breach. Section 405 merely states that one fiduciary "shall be liable" for the breach of another in some circumstances, but it says nothing about how liability is to be allocated, if at all, among the fiduciaries who are liable for the same breach. No statutory provision specifies that fiduciaries who share responsibility for a joint breach shall be jointly and severally liable. Nor does anything in the text even speak to whether a plaintiff would be limited to a single recovery, as opposed to being able to execute the same judgment against all fiduciaries liable for the

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[7] Section 405(a), 29 U.S.C. 1105(a), provides:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
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> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
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> (2) if, by his failure to comply with [ERISA § 404(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
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> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Section 405(c), 29 U.S.C. 1105(c), provides that the plan may allocate certain responsibilities among fiduciaries, and that a fiduciary whose duty is allocated to another person is not liable for that person's breach of duty, unless the allocation of duty itself involves a breach of fiduciary duty. That provision, however, does not speak to the division of liability when multiple fiduciaries are liable for the same unallocated duty.

same breach.[8] Of particular relevance here, ERISA nowhere addresses whether a fiduciary must bear the entire burden of a jointly inflicted loss, or if he may instead seek an equitable allocation of that loss through a right of contribution. As in *Firestone*, the statute has left a remedial gap to be filled through the development of federal common law rules.[9]

b. The federal common law under ERISA should properly incorporate the equitable doctrine of contribution. First, the "established principles of trust law," *Firestone*, 489 U.S. at 115, and "the common law of trusts," *Central States*, 472 U.S. at 570, strongly support this conclusion. Under the common law of trusts, multiple trustees who jointly commit a breach of fiduciary duty, and trustees liable for the breach of another, are subject to joint and

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[8] Nevertheless, courts have held that ERISA imposes joint and several liability on fiduciaries, see, *e.g.*, *Kay* v. *Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co.*, 780 F. Supp. 1447, 1461 (E.D. Pa. 1991); *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. 629, 644 (W.D. Wis. 1979), and that plaintiffs are limited to a single satisfaction of a judgment for their losses, see *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020, 1030-1031 (2d Cir. 1992).

[9] For other decisions fashioning remedies where ERISA's remedial scheme is silent on the availability of the remedy in question, see, *e.g.*, *PM Group Life Insurance Co.* v. *Western Growers Assurance Trust*, 953 F.2d 543, 546-547 (9th Cir. 1992) (adopting federal common law rule to coordinate benefits between two ERISA-regulated health benefits plans); *Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1179, 1186 (3d Cir. 1991) (in suit against fund for recovery of benefits, authorizing fund and administrator to bring cross-claim seeking restitution of benefits paid to the wrong claimant); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987) (piercing the corporate veil); *Donovan* v. *Mazzola*, 716 F.2d 1226, 1235-1236 (9th Cir. 1983) (relying on common law trust remedies to uphold order requiring fiduciaries to post bond for potential future losses resulting from a breach of fiduciary duty), cert. denied, 464 U.S. 1040 (1984).

several liability. See, *e.g.*, Restatement (Second) of Trusts § 224 cmt. a (1959); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 701, at 195-196 (rev. 2d. ed. 1982), 3A A. Scott & W. Fratcher, *The Law of Trusts* § 258, at 399 (4th ed. 1988).[10] But when the rules of joint and several liability result in a trustee's paying a disproportionate share of damages arising out of a breach, that trustee may in appropriate circumstances seek contribution or indemnity from other fiduciaries under equitable principles. See, *e.g.*, Restatement (Second) of Trusts, *supra*, § 258; G. Bogert & G. Bogert, *supra*, § 701, at 196-197; 3A A. Scott & W. Fratcher, *supra*, §§ 258-258.2, at 399-405. Otherwise, a trustee who was merely negligent in failing to protect beneficial interests would be required to bear full responsibility for losses even where another trustee caused the losses through intentional wrongdoing. See note 14, *infra*.

Second, adhering to the traditional trust law rule of contribution is consistent with "the policy of the legislation." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957).[11] ERISA protects plan partici-

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[10] This Court has repeatedly consulted the sources cited in text in fashioning federal common law rules under ERISA. See, *e.g.*, *Firestone*, 489 U.S. at 111-112, 115; *Central States*, 472 U.S. at 570 n.11.

[11] The Fairway petitioners claim that recognizing a right of contribution would disserve ERISA's objectives by (1) deterring entities from assuming the role of fiduciary, and (2) increasing the complexity and cost of litigation. 91-680 Pet. 12-18. Neither concern justifies departing from the traditional rule. First, a fiduciary is exposed to personal liability under ERISA, 29 U.S.C. 1109(a), irrespective of any right of contribution. While a fiduciary confronts more potential claimants if a right of contribution is permitted, the fiduciary also may be able to shift liability to culpable co-fiduciaries. Second, any problems associated with greater complexity in litigation may be mitigated by the court's authority to sever third-party claims for contribution or indemnity. Fed. R. Civ. P. 14(a). In deciding a Rule 14 motion, "the court typically is

pants and beneficiaries by establishing standards of fiduciary conduct and supplying appropriate remedies and sanctions for their breach. 29 U.S.C. 1001(b). Because of joint and several liability, a right of contribution will have "no financial impact on the recovery of plaintiffs," who may obtain full recovery from "any or all of the breaching fiduciaries." Pet. App. A36; see *Free* v. *Briody*, 732 F.2d 1331, 1338 (7th Cir. 1984). At the same time, such a remedy may, in many cases, assist plaintiffs in proving their case by giving defendant fiduciaries an incentive to establish the fault of co-fiduciaries who participated in a breach. In addition, a fiduciary who can seek contribution may be more willing to settle a meritorious claim and reimburse the plan for its losses.[12] Finally, because a plaintiff may, for a va-

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concerned with the effect the additional parties and claims will have on the adjudication of the main action—in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." 6 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1460, at 457 (2d ed. 1990). District courts possess like authority relative to counterclaims. Fed. R. Civ. P. 42(b). In any case, this Court in *Firestone*, 489 U.S. at 115, rejected the asserted potential for increased litigation as a basis for departing from traditional trust law.

[12] It has been suggested that a defendant may be more inclined to settle a lawsuit if the defendant confronts the entire damages award. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156, 1161 (1941). However, a plaintiff's ability to coerce "a still-unproved tortfeasor into a favorable settlement by threatening to sue him alone" does not appear to be a legitimate basis for opposing the availability of contribution. Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 Harv. L. Rev. 1170, 1172 (1941). It has also been suggested that a rule of contribution may deter a defendant from settling if the settlement does not protect him from a subsequent lawsuit seeking contribution. James, 54 Harv. L. Rev. at 1161. But a court of equity can address that concern by adopting rules under which a settlement may, in some circumstances, bar a later claim for contribution, with an appropriate adjustment in the liability of nonsettling defendants. See *In re Masters Mates & Pilots Pension*

riety of reasons, choose to sue fewer than all of the potential wrongdoers,[13] a right of contribution may be the only means of ensuring that the least culpable fiduciary does not bear the entire burden of liability while the most culpable fiduciary does not bear any. See W. Prosser & W. Keeton, *The Law of Torts* § 50, at 337-338 (5th ed. 1984).[14]

3. a. Petitioners err in contending, 91-680 Pet. 8-12, that the decision below conflicts with this Court's decisions rejecting a federal common law right of contribution under other statutes, namely Title VII and the Equal Pay Act, see *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, and the antitrust laws, see *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, *supra*. In fact, the reasoning of those decisions supports the court of appeals' holding in this case.

Both decisions rested upon the conclusion that federal courts lack general authority to fashion rules of federal

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Plan and IRAP Litigation, 957 F.2d 1020, 1028-1032 (2d Cir. 1992). The availability and scope of such a remedy under ERISA § 502 is not before this Court.

[13] For example, if the facts alleged by Sovran are true, Fairway is primarily responsible for failing to discover and remedy the breaches occurring before Sovran's appointment as trustee. Yet the current trustee, Chemung, has sued Sovran (the trustee that it replaced), rather than Fairway (the fiduciary that selected Chemung to replace Sovran).

[14] When a defendant seeks contribution in the case of an intentional tort, it is appropriate to deny that individual relief from his own deliberate wrong. But there is an "obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or the plaintiff's collusion with the other wrongdoer, while the other goes scot free." W. Prosser & W. Keeton, *supra*, § 50, at 337-338. Consistent with that view, traditional trust law limits the right of contribution to those trustees who have not breached their fiduciary duty in bad faith. See, *e.g.*, Restatement (Second) of Trusts, *supra*, § 258.

common law, and that no authority to fashion a federal common law rule of contribution existed under Title VII or the Equal Pay Act, *Northwest Airlines*, 451 U.S. at 95, 97-98, or under the antitrust laws, *Texas Industries*, 451 U.S. at 640, 643-646. But the Court was careful to emphasize that there are areas in which federal courts possess authority to create governing rules of federal common law. For example, the Court cited general admiralty jurisdiction as a source of federal common law authority, noting that *Cooper Stevedoring*, *supra*, had relied on "traditional admiralty doctrine" to find a federal common law right of contribution among joint tortfeasors. *Northwest Airlines*, 451 U.S. at 95-97; see *Texas Industries*, 451 U.S. at 641-642. The Court also noted that LMRA § 301 presents an "analogous situation" to that of admiralty, because Congress supplied federal jurisdiction and the authority to create judge-made federal rules of decision under the LMRA. *Northwest Airlines*, 451 U.S. at 96 n.35; see *Texas Industries*, 451 U.S. at 642-643 (Section 301 "not only * * * grant[s] jurisdiction over defined areas of labor law but also * * * vest[s] in the courts the power to develop a common law of labor-management relations").

Because ERISA supplies courts with federal common law rule making power to give content to the broad remedial provisions of Section 502(a), *Firestone*, 489 U.S. at 110-114, this case is governed by the same principles that apply in the admiralty and LMRA contexts. Indeed, Congress explicitly patterned Section 502(a) of ERISA after Section 301 of the LMRA (29 U.S.C. 186). See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974) ("All * * * actions [under Section 502(a)] * * * are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."); 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams) (same). This Court has confirmed, moreover, that ERISA § 502 is comparable to LMRA § 301 in

that it broadly preempts state law remedies, with the expectation that courts will develop a federal common law to provide uniform rules of decision. *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54-56 (1987); see *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 485-486 (1990).[15]

Thus, the court of appeals in this case was justified in adopting a right of contribution under Section 502 of ERISA. Just as this Court in *Cooper Stevedoring*, 417 U.S. at 110, properly crafted a federal common law right of contribution based on "traditional admiralty doctrine," *Northwest Airlines*, 451 U.S. at 97, the court below appropriately consulted "traditional trust law" to fashion a federal common law right of contribution under ERISA. Pet. App. A35. In addition, this Court has adopted federal common law rules to apportion liability between wrongdoers under LMRA § 301. See, *e.g.*, *Bowen* v. *United States Postal Service*, 459 U.S. 212, 224-228 (1983); *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967); see also *Rozay's Transfer* v. *Local Freight Drivers, Local 208*, 850 F.2d 1321, 1334-1335 (9th Cir. 1988) (right of indemnification under LMRA § 301), cert. denied, 490 U.S. 1030 (1989).[16] In view of the similarity of the

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[15] Petitioners argue that ERISA provides only "interpretive" common law authority, and not the authority to fashion rights and obligations. 91-680 Pet. 9. However, this Court has made clear that admiralty jurisdiction grants the federal judiciary authority "to fashion rules of law" and that Section 301 of the LMRA presents an "analogous situation." *Northwest Airlines*, 451 U.S. at 96-97 & n.35. Because ERISA § 502(a) was patterned after LMRA § 301, *Pilot Life*, 481 U.S. at 56, petitioners' contention is misplaced.

[16] It is true that the Court in *Texas Industries* noted a similarity between Section 301 of the LMRA and the "sweeping language" of the substantive provisions of the Sherman Act, 15 U.S.C. 1, 2; 451 U.S. at 642-643, but then found no authority to fashion a right of contribution under the "detailed and specific" remedial provisions of the antitrust laws. *Id.* at 643-646. In contrast, this Court has made clear that the open-ended remedial provisions of Section 502(a) are to be given content using federal common law. *Firestone*, 489 U.S. at 110-111.

grant of federal common law making authority under ERISA, *Texas Industries* and *Northwest Airlines* present no impediment to the court of appeals' decision in this case.

b. Contrary to petitioners' contention, 91-680 Pet. 19-20; 91-681 Pet. 6, the court of appeals' ruling is consistent with this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of his claim for benefits, asserting a right to recover compensatory and punitive damages not available under the terms of the plan. Section 502(a)(1)(B), however, explicitly authorizes a beneficiary who has wrongfully been denied benefits to bring a claim "to recover benefits due to him *under the terms of his plan.*" 29 U.S.C. 1132(a)(1)(B). The claim asserted by the beneficiary accordingly went beyond the congressional description of the beneficiaries' remedy (473 U.S. at 144), and the Court in *Russell* was asked to decide whether the apparent limitations on the remedy set forth in that Section could be avoided by permitting the claim to proceed under ERISA § 502(a)(2), which permits a beneficiary to sue a fiduciary for breaches of fiduciary duty under Section 409.

The Court declined to read Section 409 as enlarging the beneficiary's "explicitly authoriz[ed]" (473 U.S. at 144) right to recovery for wrongful denial of benefits. Instead, the Court interpreted Section 409—which provides that a fiduciary "with respect to [an ERISA] plan" is personally liable to "make good to such plan any losses to the plan" resulting from a breach of the fiduciary's duties—to require that damages under Section 409 "inure[] to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. Although Section 409 authorizes a court to award "such other equitable or remedial relief as the court may deem appropriate," 29 U.S.C. 1109(a), the Court concluded that this language only authorized " 'plan-related' relief," and did not permit a beneficiary to seek

extracontractual damages in his personal capacity. 473 U.S. at 142.[17]

Nothing in *Russell* forecloses the court of appeals' decision here. First, the court of appeals' derivation of a federal common law right of contribution among fiduciaries, Pet. App. A35-A40, does not conflict with *Russell*'s holding that the broad equitable provisions of Sections 409 and 502(a)(2) are limited to "'plan-related' relief," 473 U.S. at 142. This civil action arises out of a claim properly brought under Section 502(a)(2) on behalf of an ERISA plan based on a breach of fiduciary duty. Thus, unlike *Russell*, the question is not whether the action is within the scope of Sections 409 and 502(a)(2), but whether the court may, in fashioning "appropriate" relief, shape the award under Sections 409 and 502 to apportion damages equitably by recognizing a right of contribution.[18] In light of traditional trust principles, and

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[17] The Court also rejected the argument that ERISA authorized an implied right of action for extracontractual damages, reasoning that the comprehensive nature of the remedial scheme made it unlikely that Congress intended to imply remedies that it did not include expressly. 473 U.S. at 145-148.

[18] This case does not present the distinct question whether a fiduciary may bring an independent lawsuit seeking contribution under Section 502(a)(3), 29 U.S.C. 1132(a)(3). Respondent is a former fiduciary; hence, it is unclear whether respondent would be able to invoke the jurisdiction of the district court under Section 502(e). See *Franchise Tax Board* v. *Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 21 (1983) ("The express grant of jurisdiction in ERISA is limited to suits brought by certain parties."); 29 U.S.C. 1132(a) (specifying only the Secretary of Labor, participants, beneficiaries, and fiduciaries among the parties who may sue under Section 502). However, even if respondent were unable to bring an independent lawsuit, that fact would not affect the district court's ability to entertain a third-party claim as part of a proper lawsuit against it under Sections 409 and 502 of ERISA. Cf. *Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1179, 1186 (3d Cir. 1991) (in beneficiary's action for benefits under Section 502(a)(1)(B), fund and administrator may assert cross-claim for restitution against second beneficiary who wrongly received benefits, even though Section 502(a)(1)(B) authorizes only participants and beneficiaries to sue). If

the broad federal common law rule making authority under Section 502(a), contribution assuredly constitutes "appropriate" relief, whether the underlying action is brought under Sections 409 and 502(a)(2) or under Sections 502(a)(3) or 502(a)(5).

Second, resort to common law may not have been appropriate in *Russell* because Congress "explicitly" addressed the scope of the beneficiary's rights to recovery for wrongful denial of benefit claims in Section 502(a)(1)(B). In contrast, no section of ERISA expressly addresses the rights of fiduciaries for apportionment of liability among themselves. This case is therefore not controlled by *Russell*; rather, it is controlled by *Firestone*—which requires resort to common law doctrine where Congress simply did not address a remedial issue.

4. a. Although there is disagreement among the circuits concerning the existence of a fiduciary's right to contribution under ERISA, we do not believe that there is a conflict warranting this Court's review. Only three circuits have squarely addressed the issue presented by the petition, and it is not clear that the law has been settled even in those circuits. The Seventh Circuit has held that a right of contribution or indemnity among fiduciaries is available under ERISA. *Free* v. *Briody*,

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the district court has jurisdiction over a "civil action" under Section 502(e), 29 U.S.C. 1132(e), it also has jurisdiction to consider third-party claims for contribution under 28 U.S.C. 1367(a), which provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder * * * of additional parties.

And if federal common law supplies a right of contribution, then Rule 14(a), Fed. R. Civ. P., provides a procedural mechanism for impleading co-fiduciaries as third-party defendants.

732 F.2d 1331, 1337 (1984); see *Alton Memorial Hospital* v. *Metropolitan Life Insurance Co.*, 656 F.2d 245, 250 (7th Cir. 1981) (dictum). However, subsequent cases in the Seventh Circuit have characterized the pronouncements of *Free* and *Alton* as dictum, and have treated the issue of contribution under ERISA as unsettled.[19]

Although the Ninth Circuit has rejected a right of contribution under ERISA, see *Kim* v. *Fujikawa*, 871 F.2d 1427 (1989); *Call* v. *Sumitomo Bank*, 881 F.2d 626 (1989), it did so without explicitly discussing whether the common law grounds for relief relied upon by the Second Circuit created a right of contribution. In *Kim*, the court determined that Congress did not intend to imply a private right of action for contribution, but did not decide whether such a right could be derived as a rule of federal common law under ERISA's broad remedial provisions. In *Call*, the Department of Labor filed a brief as amicus curiae arguing that the Ninth Circuit should recognize a right to contribution based on federal common law. See Pet. App. A53-A63. Although the court of appeals deemed those arguments "persuasive," it concluded that the decision in *Kim* foreclosed reconsideration of the issue of contribution. 881 F.2d at 630-631.[20] The Ninth Circuit

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[19] See *Lumpkin* v. *Envirodyne Industries, Inc.*, 933 F.2d 449, 464 n.10 (7th Cir.), cert. denied, 112 S. Ct. 373 (1991); *Donovan* v. *Robbins*, 752 F.2d 1170, 1178 (7th Cir. 1985) (assuming without deciding that the "dicta" in *Free* and *Alton* are correct); *Mutual Life Insurance Co.* v. *Yampol*, 706 F. Supp. 596, 599-600 (N.D. Ill. 1989) (declining to follow *Free* and *Alton* on the ground that this Court's later decision in *Russell* undercut their rationale). In reserving the question whether ERISA authorizes a right of indemnification between a trustee and a nonfiduciary, the Fifth Circuit approvingly made passing reference to *Free*'s holding in *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1303 (1988), cert. denied, 490 U.S. 1089 (1989). The Fifth Circuit, however, has never squarely addressed whether a fiduciary has a right of contribution or indemnity under ERISA. See *Schloegel* v. *Boswell*, 766 F. Supp. 563, 568 (S.D. Miss. 1991) (declining to follow the dicta in *Lindemann*).

[20] The court in *Call* acknowledged that ERISA authorizes the development of a federal common law of trusts, 881 F.2d at 631-632,

has accordingly never issued a definitive ruling on the merits of the argument adopted by the Second Circuit.[21] None of the other nine circuits has squarely addressed the issue.

Further, the question whether Section 502 of ERISA authorizes courts to fashion a federal common law right of contribution is a complex one, and this history reflects the fact that there has not yet been a thorough examination of the issue in the lower federal courts. The decision of the Second Circuit here in fact represents the first time a court of appeals has explicitly addressed whether a federal common law right of contribution is consistent with this Court's decision in *Russell* (which was decided after *Free*). The court of appeals' careful analysis of the federal common law issue may well bring the question into sharper focus in the lower courts and provide the basis for a consensus to develop.

b. The contribution issue is important to the implementation of ERISA, but the interests of ERISA litigants do not require immediate resolution of the issue by this Court. The interests of ERISA beneficiaries and participants are protected because plaintiffs may continue to recover a plan's losses "from any or all breaching fiduciaries, each of whom would be jointly and severally liable," Pet. App. A36, and any increased complexity of litigation may be mitigated by various procedures allowed under the Federal Rules of Civil Procedure. See note 11, *supra*.

The practical impact of the present decision upon fiduciaries also does not warrant immediate review. The court merely recognized a right of contribution; it neither

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but because the court believed itself bound by *Kim*, it never directly addressed the argument in favor of recognizing a federal common law right of contribution under ERISA.

[21] Given *Call*'s apparent approval of the Secretary's arguments and the fact that there is now a conflict between *Call* and the decision in this case, the Ninth Circuit may find it appropriate to consider this issue en banc if it arises again in that circuit. See 9th Cir. R. 35-1 (citing inter-circuit conflict as a basis for en banc review).

defined the scope of that right, nor held petitioners liable for contribution. Because the court of appeals has remanded the case for trial, it is unclear whether petitioners will ever have to satisfy a contribution or indemnity judgment. If they do not prevail on remand, a trial and any subsequent appeal in this case will presumably shed light on the practical concerns that inform the question whether to recognize a federal common law right of contribution under ERISA. See pp. 10-12, *supra*. Accordingly, the interlocutory posture of this case also counsels against further review at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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